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No. 08-805

Supreme Court, U.S.
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In The
Supreme Court of the United States

SSC ODIN OPERATING COMPANY LLC,
D/B/A ODIN HEALTH CARE CENTER,

Petitioner,

v.

SUE CARTER, SPECIAL ADMINISTRATOR
OF THE ESTATE OF JOYCE GOTT,

Respondent.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois, Fifth District

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Appellate Court of Illinois, Fifth District, affirmed the denial of petitioner's motion to compel arbitration. Should respondent be compelled to arbitrate one of her claims, even though no valid arbitration agreement exists between the parties?

TABLE OF CONTENTS

	Page
INTRODUCTION	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT	4
I. There Is No Valid Agreement to Arbitrate Respondent's Wrongful Death Claim	5
A. The FAA Does Not Require Courts to Force Arbitration on Parties Who Have Not Agreed to Arbitrate.	5
B. The Illinois Court of Appeals, Fifth District, Applied Established and Routine Principles of State Contract Law.	7
II. There Is No Split in Authority on the Questions Presented in the Petition	10
CONCLUSION	12

TABLE OF AUTHORITIES

Page

CASES

14 Penn Plaza v. Pyett, ___ S. Ct. ___, 2009 WL 838159 7

Allied-Bruce Terminix Co's, Inc. v. Dobson, 513 U.S. 265 (1995) 7

AT & T Technologies, Inc. v. Communications Workers, 475 U.S. 643, 106 S. Ct. 1415 (1986) 5

Chapman v. Anchor Lumber, 823 N.E.2d 594 (3d Dist. Ill. App. 2005) 12

Doctor's Associates, Inc. v. Casarotto, 517 U.S. 681 (1996) 2, 7, 8

First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 115 S. Ct. 1920 (1995) 5

Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 109 S. Ct. 2782, 106 L.Ed.2d 26 (1989) 7

Green Tree Fin. Corp. v. Bazzle, 539 U.S. 444 (2003) 5

Green Tree Fin. Corp.-Alabama v. Randolph, 531 U.S. 79 (2000) 8

Kinkel v. Cingular Wireless LLC, 223 Ill. 2d 1 (2009) 8

Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc., 181 Ill. 2d 214 (1998) 7

Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52 (1995) 5

TABLE OF AUTHORITIES – Continued

Page

Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 4

O'Hara v. Ahlgren, Blumfeld and Kempster, 127 Ill. 2d 333 (1989) 7

Perry v. Thomas, 482 U.S. 483, 107 S. Ct. 2520 (1987) 2, 8, 9

Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974) 9

Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468 (1989) 5

Washington v. Confederated Bands and Tribes of Yakima Nation, 439 U.S. 463, 99 S. Ct. 740, 58 L.Ed.2d 740 (1979) 7

STATUTES

Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.* ..... *passim*

Illinois Nursing Home Care Act ("INHCA"), 210 Ill. Comp. Stat. 45/1-101 *et seq.* 2, 7

Illinois Wrongful Death Act ("IWDA"), 740 Ill. Comp. Stat. 180/101 *et seq.* 1, 2

RULES

Supreme Court Rule 10 9

INTRODUCTION

Petitioner seeks review of a decision of an intermediate state appellate court on whether unusual state statutory provisions applicable only to nursing home residents are preempted by the Federal Arbitration Act (FAA). Petitioner concedes that only two other states have comparable statutes and that no federal appellate court or state court of last resort has ruled on whether such statutes are preempted. In the absence of a conflict or of any indication that such statutes are common or that the issue presented is a frequently recurring one, Petitioner has failed to demonstrate that this case presents an issue of sufficient importance to merit this Court's review.

Moreover, Petitioner overlooks that regardless of how this Court might resolve the preemption question it seeks to present, it will still have to litigate with Respondent in court, because Respondent never entered into an arbitration agreement with Petitioner, and her lawsuit raises a claim under the Illinois Wrongful Death Act that belongs exclusively to her rather than to the Decedent who signed the arbitration agreements at issue. The lower court did not have to reach this issue because it held the arbitration agreements invalid, but if the case were remanded, it would have to address this issue and could not direct Respondent's wrongful death claim to arbitration. Thus, Petitioner's preemption argument will not keep it out of court no matter how it is resolved, and this Court should not devote its

attention to an issue that, ultimately, will have so little impact on the course of the proceedings below.

Finally, in resolving the preemption issue posed by Petitioner, the lower court conscientiously applied the relevant decisions of this Court, including *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681 (1996) and *Perry v. Thomas*, 482 U.S. 483, 107 S. Ct. 2520 (1987) and correctly recognized that those decisions hold that the FAA permits application to arbitration of generally applicable state-law contract principles but preempts application of state-law principles that apply distinctively to arbitration agreements. Petitioner does not take issue with the lower court's statement of the principles derived from this Court's decisions, but only with their *application* to an unusual set of state statutes. Even if Petitioner's complaints about the lower court's application of FAA preemption principles were correct, error correction – especially with respect to a decision that does not necessarily reflect the final word of the Illinois courts with respect to the issue presented – is not a sufficient basis for invocation of this Court's discretionary jurisdiction.

STATEMENT OF THE CASE

This case involves claims that Respondent Sue Carter brought pursuant to the Illinois Nursing Home Care Act (INHCA) and the Illinois Wrongful Death Act (IWDA) to recover damages resulting from

injuries sustained by and the death of Joyce Gott. Respondent alleged that the Petitioner failed to provide adequate care to Joyce Gott while Ms. Gott was a resident at Petitioner's nursing home. Joyce Gott was admitted into Odin Health Care Nursing Home on January 12, 2006 to convalesce from a surgical procedure that fixed a hip fracture. At the time of admission, Ms. Gott was on Coumadin, a blood thinner. As a result, Dr. Aziz Rahman, Ms. Gott's family doctor, provided a "Doctor's Protocol" sheet with her admission, that required the staff at Odin to test her PTINR levels **daily** for the first three days, then once a week for the three weeks after that, and then once every two weeks for three weeks following that. The purpose of the testing was to check the coagulation of the blood. Contrary to the specific instructions on the "Doctor's Protocol," Ms. Gott's PTINR was taken on January 13, 2006, and not taken again. Because Odin failed to test Ms. Gott's blood according to the protocol, they failed to detect that Ms. Gott's blood had become too thin. As a result, Ms. Gott, 75 years-old at the time, developed gastrointestinal bleeding and died on January 31, 2006.

Odin moved the trial court to compel arbitration based on two written arbitration agreements signed by or on behalf of Ms. Gott. In response to the motion, Carter raised several state-law defenses, including lack of mutuality, voidness for illegality, and that Carter is a non-party not bound by the agreements. The trial court denied the motion to compel arbitration and the Illinois Appellate Court, Fifth District,

affirmed. The Illinois Supreme Court denied Odin's petition for leave to appeal.

REASONS FOR DENYING THE WRIT

Contrary to petitioner Odin's assertion, review by this Court is not necessary to ensure proper and uniform application of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, to determine if a claim is subject to arbitration, nor does the decision below present an irreconcilable conflict with this Court's precedents. Rather, this matter involves traditional principles of contract interpretation and, under the FAA, arbitration agreements are subject to generally applicable state law contract defenses. Moreover, regardless of any decision this Court might render with respect to the question presented by Odin, the outcome with respect to Carter's wrongful death claim would remain the same, because Carter was not a party to any arbitration agreement. That is, regardless of how this Court might resolve the pre-emption question petitioner seeks to present, it will still have to litigate with Respondent in court. This is so because the FAA "does not require parties to arbitrate when they have not agreed to do so." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985).

I. There Is No Valid Agreement to Arbitrate Respondent's Wrongful Death Claim.

A. The FAA Does Not Require Courts to Force Arbitration on Parties Who Have Not Agreed to Arbitrate.

The FAA places arbitration agreements on equal footing with other contracts. Contracts do not become super contracts simply because of the presence of an arbitration clause.

Nothing in the FAA overrides normal rules of contract formation; the Act's goal was to put arbitration on a par with other contracts and eliminate any vestige of old rules disfavoring arbitration. Arbitration depends on agreement, see *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 943, 115 S. Ct. 1920 (1995); *AT & T Technologies, Inc. v. Communications Workers,* 475 U.S. 643, 648-49, 106 S. Ct. 1415 (1986), and this Court has repeatedly stated that "when deciding whether the parties agreed to arbitrate a certain matter . . . courts generally should apply ordinary state-law principles that govern the formation of contracts." *First Options*, 514 U.S. at 944; see also *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 60-63 (1995); *Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) ("the interpretation of private contracts is ordinarily a question of state law, which this Court does not sit to review"); *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 447 (2003) (the contractual interpretation question of whether an arbitration clause permitted

class actions in arbitration was "a matter of state law. . . .")

It is axiomatic that a party to a contract cannot bargain away a right he or she does not have. Indeed, petitioner Odin does not dispute the fact that the right to bring a wrongful death claim does not belong to the decedent. Nor is there any contention that respondent Carter ever entered into any agreement to arbitrate any claim. Thus, there is no denying in this case that Carter's wrongful death claim is not subject to the arbitration agreement, and Odin does not contend otherwise. Regardless of the resolution of the preemption issues raised by the petition, therefore, Carter's wrongful death claim cannot be referred to arbitration, and the case against the nursing home will inevitably proceed in the trial court on the wrongful-death claim.

Because the court below could have reached the same outcome by denying arbitration on this ground – and would be required to address the issue and reach the same result even if the Court were to decide the preemption issue adversely and remand – this Court should deny the petition for certiorari on this independent basis.[1]

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[1] This Court recently reiterated that:

"Without cross-petitioning for certiorari, a prevailing party may, of course, 'defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered

(Continued on following page)

B. The Illinois Court of Appeals, Fifth District, Applied Established and Routine Principles of State Contract Law.

In *Allied-Bruce Terminix Co's, Inc. v. Dobson,* 513 U.S. 265, 281 (1995), this Court reiterated that "States may regulate contracts, *including arbitration clauses*, under general contract law principles and they may invalidate an arbitration clause 'upon such grounds as exist at law or in equity for the revocation of any contract.'" (emphasis added). The court below applied this principle in rejecting Odin's preemption claim. First, the court made the unremarkable observation that "a violation of public policy can be a legitimate generally applicable defense to all contracts in Illinois." Pet. App. 6a (*citing O'Hara v. Ahlgren, Blumfeld and Kempster*, 127 Ill. 2d 333, 314-42 (1989); *Kleinwort Benson North America, Inc. v. Quantum Financial Services, Inc.*, 181 Ill. 2d 214, 226-27 (1998).

Next, the Illinois Court of Appeals observed that, unlike the statute at issue in *Doctor's Associates, Inc. v. Casarotto,* 517 U.S. 681, 687 (1996), the Illinois Nursing Home Care Act (INHCA) (210 Ill. Comp.

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by the District Court or the Court of Appeals.'" *Granfinanciera, S.A. v. Nordberg*, 492 U.S. 33, 38-39, 109 S.Ct. 2782, 106 L.Ed.2d 26 (1989) (quoting *Washington v. Confederated Bands and Tribes of Yakima Nation*, 439 U.S. 463, 476, n. 20, 99 S. Ct. 740, 58 L.Ed.2d 740 (1979)).

14 Penn Plaza v. Pyett, ___ S. Ct. ___, 2009 WL 838159 at *15.

Stat. 45/3-606 and 3-607, "represent[s] 'emphatically stated public policy' that has existed in this state for nearly 30 years." Pet. App. 7a. The Illinois Appellate Court correctly stated that:

> The rule stated in *Casarotto* and [*Perry v.*] *Thomas*[, 482 U.S. 483 (1987),] [is] that state law is applicable and is not preempted by the Federal Arbitration Act if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally.

Pet. App. 9a. The Illinois Appellate Court then applied the rule as stated in *Casarotto* and *Thomas* to the facts of this case and concluded that:

> because the public policy expressed in sections 3-606 and 3-607 concerns the validity, revocability and enforceability of contracts generally and does not specifically target arbitration agreements, it presents a legitimate state law contract defense of a violation of public policy to the agreements and so voids the agreements.

Pet. App. 10a (citing *Kinkel v. Cingular Wireless LLC*, 223 Ill. 2d 1, 15-19 (2009)). The reasoning of the Illinois Appellate Court is consistent with this Court's express holding in *Casarotto* that "[c]ourts may not . . . invalidate arbitration agreements under state laws applicable only to arbitration provisions." 517 U.S. at 686. Thus, despite the "liberal federal policy favoring arbitration agreements," *Green Tree Fin. Corp.-Alabama v. Randolph*, 531 U.S. 79, 81 (2000),

state law is not entirely displaced from the FAA preemption analysis. Under § 2, "state law, whether of legislative or judicial origin, is applicable if that law arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Thomas*, 482 U.S. at 492 n. 9 (1987). In other words, in enacting the FAA "Congress [only] precluded States from singling out arbitration provisions for suspect status, requiring instead that such provisions be placed 'upon the same footing as other contracts.'" *Id.* (quoting *Scherk v. Alberto-Culver Co.*, 417 U.S. 506, 511 (1974)). In short, the Illinois Appellate Court's ruling is consistent with this Court's precedents.

It is also well established that state law governs the enforceability of contracts, so long as the state law does not disfavor arbitration clauses as compared to other contract terms. Here, Odin has not shown, and cannot show, a conflict or a "state of confusion" about either these broad principles or their application to this case. Indeed, Odin's claim is, at most, that the court below misapplied correctly stated legal principles to the particular Illinois statutes involved in this case. Even if Odin was correct, such a claimed error by an intermediate-level state appellate court hardly warrants review by this Court. Indeed, this Court's Rule 10 specifically admonishes that "[a] petition for certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law."

II. There Is No Split in Authority on the Questions Presented in the Petition.

In an effort to dress up its request for review of the correctness of the lower court's decision as an issue meriting this Court's attention, petitioner Odin claims that the decision conflicts with a number of decisions of federal appellate courts. An examination of the decisions Odin cites, however, reveals that the conflict is chimerical. The federal appellate cases Odin cites involve the very different question whether statutes that forbid the enforcement of forum selection clauses in franchise or construction contracts are preempted by the FAA when applied to arbitration agreements including such clauses. [Pet. 26-27] That may be an interesting and even important question, but cases resolving it hardly present a square conflict with a decision about the enforceability of an arbitration agreement involving a nursing home resident.

Turning to the issue actually directly involved in the case, Odin concedes that it has been able to locate only two other states that have statutes that are directly comparable to the Illinois laws at issue here – a concession that significantly undermines any suggestion that the issue presented here is of broad, national importance. And as to whether such statutes are preempted by the FAA, Odin cites only two unreported and unappealed federal trial-court rulings that touched on the preemption question [Pet. 26-27], neither of which involved a direct attempt to enforce an arbitration provision in a contract signed by a

nursing home resident. In other words, the issue presented has yet to reach either a state court of last resort or a federal appellate court, in this or any other case. If and when the issue is resolved at that level, its resolution presents a conflict, there will be ample time for the Court to address that issue.

In a final attempt to suggest the existence of a conflict of state supreme court authority, Odin cites rulings of the Oklahoma, Alabama, Mississippi, and Texas Supreme Courts on a different issue – whether contracts between nursing homes and their residents involve interstate commerce sufficiently to trigger application of the FAA. [Pet. 27-28] The decision below, however, did not even suggest that the FAA was inapplicable for that reason, and, indeed, assumed its applicability. Odin's claim that the Oklahoma state court's resolution of the interstate commerce issue indicates that they are "hostile" to the FAA might conceivably offer some reason for review of an Oklahoma decision based on the commerce rationale, but it is hardly a reason for reviewing an Illinois decision that did not even address that issue. In other words, even if there is a split among the state supreme courts as to whether contracts between nursing homes and their residents involve interstate commerce, this case simply does not present that question and such a split cannot be a basis for review.

In the end, this case involves only the views of one intermediate state appellate court on preemption of an unusual state statute. Based on Odin's own canvass of the judicial landscape, it is evidently the

first appellate court in the country to address preemption of such a statute. And its holding is not even definitive within its own state: the Illinois courts of appeals for other districts may conceivably resolve the issue differently, as may the Illinois Supreme Court, should a conflict among the lower state courts arise that requires resolution at a higher level. *Chapman v. Anchor Lumber*, 823 N.E.2d 594, 596 (3d Dist. Ill. App. 2005) (noting that Illinois has five appellate districts, and the decisions of one district are not binding on the others). Only at that point will the view of the Illinois courts be finally settled, and only if that view comes into conflict with decisions of other state courts of last resort or federal courts of appeals might an issue requiring resolution by this Court be presented.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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